82-748

No.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LINCOLN CREDIT CO., D. H. FINANCE CORP., ACE F.S. INC., C.F.S. INC., COLONIAL CREDIT INC., and GATEWAY INVESTMENT CORP.,
Appellants,

vs.

GEORGE PEACH, as Circuit Attorney of the City of St. Louis, Missouri,

and

JOHN ASHCROFT, as Attorney General of the State of Missouri,

and

BENEFICIAL FINANCE CO. OF MISSOURI, INC., Intervenor,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Missouri's statute, V.A.M.S. §408.096, the effect of which is to make it a crime for an agent of a borrower to charge or receive a fee for arranging credit for the borrower, as Appellants lawfully did prior to the statute, and to make void any promissory note evidencing such credit, while allowing the agent of a lender, under other Missouri statutes, to charge and receive a fee for arranging the same kind of credit with impunity, creates invidious discrimination through a constitutionally faulty classification, without any reasonable relationship to a legitimate state interest, thereby depriving Appellants of their liberty of contract and their property without due process of law, and denying to Appellants the equal protection of the law in violation of Amendment 14, §1 of the Constitution of the United States?

Among other Missouri statutes, V.A.M.S. §408.095 permits agents of lenders to charge and receive fees not in excess of 2% per month on outstanding amounts of loans which they arrange.

2. Whether Missouri's statute, V.A.M.S. §408.096, which makes it a crime to impose or receive any fee, other than a fee "expressly provided for by statute, for arranging credit in the amount of $1,000.00 or less the proceeds of which are intended to be used by the borrower primarily for personal, family, or household purposes", is so vague and uncertain as to make its application to Appellants constitute a violation of Amendment 14, §1 of the Constitution of the United States by depriving Appellants of their liberty of contract and their property without due process of law, when the prohibited "arranging credit" requires a determination by Appellants in each credit transaction of what fees are for "arranging" credit, what other statutes contain fees "expressly provided for by statute," and a determination of what "credit" is "intended to be used by the borrower primarily for personal, family, or household purposes"?

3. Whether the Missouri summary judgment procedure has been interpreted and applied by the Missouri Supreme Court in such a manner as to deny to Appellants an opportunity to be heard at a meaningful time and in a meaningful manner on material issues in this case, in violation of the due process and equal protection clauses of Amendment 14, §1 of the Constitution of the United States, particularly by the action of the Missouri Supreme Court in (1) adopting as fact the Appellees' theory of the state interest underlying the enactment of V.A.M.S. §408.096, when such theory is not supported by anything in the Record on Appeal and thus, under Missouri case precedent, is not entitled to be taken into consideration on appeal; (2) applying a Missouri vagueness test for non-criminal statutes instead of the applicable Federal test for criminal statutes, as briefed by Appellants; and (3) refusing to consider, or ignoring two issues briefed by Appellants, namely, the vagueness of certain statutory provisions, and the violation of substantial property interests of Appellants arising under Article 3, §44 of the Missouri Constitution of 1945 which requires that "rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business?"

These court actions first appeared in the Opinion of the Missouri Supreme Court, which affirmed the summary judgment of the trial court upholding the validity of V.A.M.S. §408.096 on all involved issues of constitutional law, in opposition to Appellants' Motion for Summary Judgment to declare said statute unconstitutional. These actions were immediately challenged, in Appellants' Motion for Rehearing, as violating Appellants' due process and equal protection rights under Amendment 14, §1 of the Constitution of the United States.

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LINCOLN CREDIT CO., D. H. FINANCE CORP., ACE F.S. INC., C.F.S. INC., COLONIAL CREDIT INC., and GATEWAY INVESTMENT CORP.,
Appellants,

vs.

GEORGE PEACH, as Circuit Attorney of the City of St. Louis, Missouri,

and

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BENEFICIAL FINANCE CO. OF MISSOURI, INC., Intervenor,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

OPINIONS BELOW

This appeal is from an Opinion of the Supreme Court of Missouri, En Banc, filed on July 6, 1982. The Opinion is reported at 636 S.W.2d 31, and appears in the Appendix hereto at Page A-1 thereof. Appellants' Motion for Rehearing, which appears in the Appendix at page A-20 thereof, was filed on July 21, 1982, (see Appendix, Page A-35 thereof), and was denied on August 2, 1982, by an order which appears in the Appendix at Page A-36 thereof.

The Opinion of the Supreme Court of Missouri, affirming the judgment of the trial court, was on an appeal by the plaintiffs from a summary judgment of March 16, 1981, appearing in the Appendix at Page A-16 thereof, as amended by an order of April 2, 1981, appearing in the Appendix at Page A-19 thereof, granted by the Circuit Court of Missouri, Twenty-Second Judicial Circuit, Division 3, by the Honorable MURRAY L. RANDALL, Judge, in response to a Motion for Summary Judgment filed by plaintiffs on October 24, 1980.

JURISDICTIONAL GROUNDS

The Opinion of the Supreme Court of Missouri, filed on July 6, 1982, affirmed a summary judgment upholding V.A.M.S. §408.096 as being valid under the Constitution of the United States. Appellants' Petition sought a declaratory judgment that said statute was unconstitutional under the due process clause and the equal protection clause of Amendment 14, §1 of the Constitution of the United States, and an injunction against its enforcement. Appellants' Motion for Rehearing was filed on July 21, 1982, within fifteen days after the filing of the Opinion, as required by V.A.M.R. 84.17. The Motion for Rehearing raised additional due process and equal protection issues of Federal constitutional law based upon the Missouri Supreme Court's deviation from Missouri case precedent, disregard of Federal case precedent, and failure and refusal to consider material issues covered by appellate briefs. On August 2, 1982, the Motion for Rehearing was denied.

On September 1, 1982, Appellants' Notice of Appeal to the Supreme Court of the United States, together with proof of service of said notice, was filed with the Clerk of the Supreme Court of Missouri, as appears in the appendix at Page A-37 thereof, and also with the Clerk of the Ciruict Court of Missouri, Twenty-Second Judicial Circuit, as appears in the Appendix at Page A-41 thereof, all as required by the Supreme Court Rule 10.

The jurisdiction of this appeal is based upon 28 U.S.C.A. §1257(2). See *Hicks* v. *Miranda*, 422 U.S. 332, 343-344, 95 S.Ct. 2281, 45 L.Ed.2d 223, 236 (1975); *Lathrop* v. *Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 6 L.Ed.2d 1191, 1194-1196 (1961)*, and *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 79-80, 100 S.Ct. 2035, 64 L.Ed.2d 741, 751 (1980). This appeal and the docketing of this case are being effected within ninety days following August 2, 1982, the date of denial of Appellants' timely filed Motion for Rehearing, as required by Supreme Court Rules 11 and 12.

CONSTITUTIONAL PROVISIONS, STATE STATUTES, AND PROCEDURAL RULES INVOLVED

This case involves the validity of V.A.M.S. §408.096 under Amendment 14 §1 of the Constitution of the United States, which states:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The validity of V.A.M.S. §408.096 under the foregoing provisions of the Constitution of the United States also involves the rights established by Article 3, §44 of the Missouri Constitution of 1945, which states:

> "No law shall be valid fixing rates of interest or return for the loan of use of money, or the service or other charges made or imposed in connection therewith, for any particular group or class engaged in lending money. The

rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business."

The statute whose constitutionality is at issue, namely V.A.M.S. §408.096, states:

> "*408.096.* No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor."

The effect of V.A.M.S. §408.096 is significantly influenced by V.A.M.S. §408.095, which states:

> "*408.095.* Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two percent per month, except as permitted by the laws of this state, shall be deemed guilty of a misdemeanor. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Numerous other statutes are relevant, as indicated in the Appendix at page A-45 thereof. Certain Missouri Rules of Civil Procedure of relevance also appear in the Appendix at page A-49 thereof.

STATEMENT OF THE CASE

The facts established in the trial court, as relevant here, are that each Appellant was a corporation organized under the law of Missouri, and doing business in Missouri on and before June 15, 1979, when V.A.M.S. §408.096 was enacted by the Missouri legislature. During the three years immediately preceding the filing of the Petition by Appellants, their only business involved arranging credit in amounts that were less than $1,000.00. The credit arranged by each Appellant was pursuant to a contract between each Appellant and the prospective borrower who employed the particular Appellant to act as agent for the borrower to negotiate a loan for the borrower from a third party lender, in return for the payment of a fee to the particular Appellant. The fee to each Appellant also covered a guarantee by the particular Appellant of the borrower's obligation to the third party lender. The transactions handled by each Appellant were held by the trial court to come under the prohibitions of V.A.M.S. §408.096, which became effective on September 28, 1979. Thus, the business previously carried on by each Appellant prior to the effective date of the statute would not be lawful after the effective date of the statute, if the statute is valid.

The Petition, filed by Appellants on September 7, 1979, in the Circuit Court of Missouri, Twenty-Second Judicial Circuit as Case No. 794-0267, was against Appellees George Peach, as Circuit Attorney of the City of St. Loius, Missouri, and John Ashcroft, as Attorney General of the State of Missouri. It sought a declaratory judgment that V.A.M.S. §408.096, adopted on June 15, 1979, by the Missouri 80th General Assembly, First Regular Session, as part of a Bill containing many other statutory sections, and approved by the Governor on July 3, 1979, was invalid, null and void by reason of violating various provisions of the Missouri Constitution of 1945 and of the Constitution of the United States, and a tem-

porary restraining order and a permanent injunction against the aforesaid Appellees to prevent enforcement of said statute.

A restraining order was issued on September 7, 1979, and was continued in effect, by various court orders, throughout proceedings in the trial court and until the decision of the Missouri Supreme Court.

A motion to intervene as a defendant was filed in the trial court September 26, 1979, by Appellee Beneficial Finance Co. of Missouri, Inc., which motion was sustained on October 5, 1979.

After various discovery procedures had been carried out in the trial court, on October 24, 1980, Appellants filed their Motion for Summary Judgment, asserting that under the uncontroverted facts and law, V.A.M.S. §408.096 was in clear violation of certian designated provisions of the Missouri Constitution of 1945 and, in certain respects, in violation of the due process and equal protection provisions of Amendment 14, §1 of the Constitution of the United States. The Motion for Summary Judgment did not deal with all issues mentioned in Appellants' Petition, but it did raise the Federal constitutional issues of whether the challenged statute deprived the Appellants of their property without due process of law and denied to Appellants the equal protection of the law, by reason of the vagueness of the statute and by reason of invidious discrimination in prohibiting Appellants' previously lawful business and making void a promissory note executed as part of a prohibited transaction while permitting other businesses to operate with impunity and permitting enforcement of a promissory note executed for credit arranged under the protection of other statutes. The invidious discrimination issue, as raised by Appellants, included a claimed violation of Article 3, §44 of the Missouri Constitution of 1945.

The Motion for Summary Judgment was argued before the trial court. On March 16, 1981, the trial court entered an order denying Appellants' Motion for Sumary Judgment, and, under V.A.M.R. 74.04(c), the court found for Appellees, decreeing that there were no genuine issues of material matters of fact or law, and that V.A.M.S. §408.096 was not in violation of *any* con stitutional provisions, Federal or State, involved in the case. Upon a motion of Appellants to modify the summary judgment decree so as to continue the amended restraining order and bond in effect pending an appeal by the Appellants, the trial court on April 2, 1981, entered an order amending the summary judgment and decree so as to permit the restraining order to remain in effect pending a decision by the Supreme Court, which order appears in the Appendix at Page A-19 thereof.

After filing a timely notice of appeal to the Missouri Supreme Court, Appellants timely filed their Brief with the Missouri Supreme Court. That Brief dealt specifically with the vagueness issues mentioned in the second Question Presented in this Jurisdictional Statement, which were encompassed by the summary judgment and decree of the trial court. Appellants' Brief also dealt specifically with the issue of how V.A.M.S. §408.096 violates Appellants' property rights under Article 3, §44 of the Missouri Constitution of 1945, which requires that rates of interest be applicable generally and to all lenders without regard to the type or classification of their business.

The Opinion of the Missouri Supreme Court, filed on July 6, 1982, affirmed the judgment of the trial court in granting summary judgment for the Appellees, thereby upholding the validity of V.A.M.S. §408.096, on *all* constitutional law issues in the case, Federal and State. In that Opinion, the Missouri Supreme court refused to consider certain portions of the vagueness issue on the ground that all said issues were not presented to the trial court, citing the cases of *School District of Kansas City* v. *Smith,* 111 S.W.2d 167 (Mo.Sup., 1937) and *Alexander* v. *Haden,* 2 Mo. 211 (1830). The Court also applied a vagueness

test for due process purposes based upon the Missouri case, *Prokopf* v. *Whaley*, 592 S.W.2d 819, 824 (Mo.Sup., 1980), that involved a non-criminal administrative order. The Missouri Supreme Court Opinion also basically ignored the substance of the issue pertaining to Article 3, §44 of the Missouri Constitution of 1945, as briefed.

The Opinion of the Missouri Supreme Court also adopted as fact the suggestion contained in the Brief of the Appellee John Ashcroft, Attorney General of the State of Missouri, that the substantial state interest that gives a constitutional basis for validity of V.A.M.S. §408.096, under the due process and equal protection provisions of Amendment 14, §1 of the Constitution of the United States, "could" be to protect the poor and uneducated in need of small personal loans from usury, outrageous fees, and other described practices. There is nothing in the Record on Appeal to the Missouri Supreme Court that supports the suggestion contained in the Brief of said Appellee.

On July 21, 1982, Appellants filed with the Missouri Supreme Court a Motion for Rehearing and Suggestions in Support thereof, with proof of service on opposing counsel.

The Motion for Rehearing, which appears in the Appendix at page A-20 thereof, raised as additional Federal due process and equal protection issues those matters described in the third Question Presented in this Jurisdictional Statement, which issues first appeared in the Opinion of the Missouri Supreme Court. On August 2, 1982, the Appellants' Motion for Rehearing was overruled, as appears in the Appendix at Page A-36 thereof.

On September 1, 1982, a Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Supreme Court of the State of Missouri, as appears in the Appendix at Page A-37 thereof, and with the Clerk of the Circuit Court of Missouri, Twenty-Second Judicial Circuit, as appears in the Appendix at Page A-41 thereof.

SUBSTANTIAL QUESTIONS PRESENTED REQUIRING PLENARY CONSIDERATION

There are three principal reasons why the issues presented on this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument. These reasons are as follows.

1. First, there is a substantial issue as to whether V.A.M.S. §408.096 constitutes invidious discrimination against Appellants, since its effect is to make a crime of the previously lawful business of Appellants of arranging credit as agents of borrowers, while permitting others to conduct a similar business as agents of lenders, with impunity.

The provisions of V.A.M.S. §408.096 prohibit any fees for arranging the kind of credit described in the statute, except such fees as are expressly provided in other statutes. The right of Appellants to charge a fee for arranging credit as agents of borrowers has historically always been based upon Missouri case precedent, as found in *Hansen* v. *Duvall,* 333 Mo. 59, 62 S.W.2nd 732, 736 (1933) and *State* v. *Sargent,* 256 S.W.2d 265, 269 (Mo. App., 1953), as well as several other cases. There have been no statutory provisions establishing any limits as to the amount of such fees, but there have been and are statutes establishing limits to the amounts that could be charged to borrowers by agents of lenders for arranging credit. Such limits appear in various statutes, especially in V.A.M.S. §408.095, and §408.140, as modified by §408.190.

Since the fees for arranging credit as agents of borrowers, which had been the business of Appellants, are not provided for in any other statutes, those fees are not permitted under V.A.M.S. §408.096, and promissory notes for the credit so arranged are void under V.A.M.S. §408.096. On the other hand, fees to agents of lenders for arranging credit are permitted under V.A.M.S. §408.095, and the promissory notes for credit

so arranged are valid. This destruction of Appellants' business, while preserving the similar businesses of others, poses an invidious discrimination issue under the principles of *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 560-563, 22 S.Ct. 431, 46 L.Ed. 679, 690-691 (1902), and is of such great substance as to justify and require plenary consideration.

The Missouri Supreme Court in this case held that V.A.M.S. §408.096 constitutes a valid classification because it "could" be based upon the substantial state interest of protecting a poor and uneducated segment of the borrowing public against excessive credit costs, as suggested by the brief of Appellee, John Ashcroft, Attorney General of the State of Missouri. There is nothing in the Record on Appeal that gives any support to that suggestion or holding. Moreover, as indicated below, there is no basis in the law for considering as fact such statements in the brief of counsel that are not supported by the Record on Appeal and are not conceded by opposing counsel.

The above holding of the Missouri Supreme Court also raises a substantial issue of whether V.A.M.S. §408.096 contains any legitimate classification, since its effect depends upon what is expressed in other statutes, which are themselves subject to periodic change. The terms of the challenged statute do not truly reveal the purpose or actual effect of the statute.

Even if such a state interest were established, it does not follow, by any logic or reason, that V.A.M.S. §408.096 has any rational or reasonable relationship to serving that state interest. Prior to enactment of V.A.M.S. §408.096, the legislative procedure for regulating the business of arranging credit was by establishing statutory rate ceilings for such fees and for interest on loans so arranged, wherever deemed appropriate, as in the various sections of V.A.M.S. Chapter 408,, and especially in V.A.M.S. §§408.095, 408.100, 408.140, and 408.190. Therefore, the usual and presumably reasonable and rational

legislative approach to protect a particular segment of the borrowing public not already protected by existing statutes would have been to enact statutes establishing appropriate limitations on fees for business transactions of the type for which there was a perceived need of regulation, rather than a total prohibition of fees, as contained in V.A.M.S. §408.096. If there was any perceived need for legislation to protect the public against excessive charges for arranging credit that was not already under statutory regulation, it clearly was because there had not been any legislation establishing a known policy on the matter, which was not the fault of Appellants.

Since the effect of V.A.M.S. §408.096 is to eliminate businesses such as Appellants, there is an issue of great substance as to whether the obvious purpose and effect of the challenged statute is to force the borrowing public that formerly used the services of Appellants to use the services of other businesses operating under other existing statutes. Indeed, considering legislative history, the obvious effect and foremost purpose of V.A.M.S. §408.096 is the elimination of competition from businesses such as Appellants, for the primary benefit of other businesses. Under the case of *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285, 97 S.Ct. 1740, 52 L.Ed.2d 304, 320 (1977), a statute whose purpose and effect is the destruction of competition is not constitutional under the due process and equal protection clauses of Amendment 14, §1 of the Constitution of the United States.

The issue here presented is of great substance in these times, because of the significant role of special interest groups in legistative lobbying for enactment of legislation affecting interest rates and fees in connection with the extension of credit, such as V.A.M.S. §408.096. The elements of the business public, such as Appellants, who are not formidable enough to be a strong political force in the legislative process therefore are relegated either to submission to such legislation as is enacted, or to challenge the statute via the judicial process.

Under *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283, 52 S.Ct. 556, 558, 76 L.Ed. 1102, 1107 (1932), and *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42, 64 S.Ct. 384, 88 L.Ed. 526, 530 (1943), the Supreme Court of the United States will examine a state court decision upholding a state law to determine whether there is a fair or substantial basis for the decision of the state court, even if the decision is based on non-Federal issues. There is no reason of substance why agents of borrowers, such as Appellants, should be denied the right to charge a fee for arranging credit for a borrower, which transaction may even involve guaranteeing the loan made by the third party lender to the borrower, while an agent of a lender is permitted, under V.A.M.S. §408.095, to charge a fee for arranging such credit, which fee is passed on as a charge against the borrower. Similar discrimination was held to be invalid in *Wallace* v. *Zinman*, 200 Cal. 585, 254 P. 946, 950-951 (1927).

2. Secondly, there is a substantial due process issue as to the vagueness of V.A.M.S. §408.096, which should be of great public concern. This statute creates a new criminal offense of receiving a fee for arranging certain kinds of credit that depends upon the meaning of very uncertain terminology. First, it is uncertain what acts constitute "arranging" credit. Does "arranging" include the guaranteeing of the loan? The Opinion of the Missouri Supreme Court leaves this issue in doubt. Secondly, the criminal offense depends upon a determination by the arranger of credit of whether the "credit" is intended to be used by the borrower primarily for personal, family, or household purposes. Third, it is uncertain what fees are prohibited, because there is no crime if the fees are expressly provided for in other statutes. However no other statutes are identified. Under V.A.M.S. §§408.095, 408.140, and 408.190, which appear relevant, other statutes become relevant, such as V.A.M.S. §367.100 and various statutes in V.A.M.S. Chapter 408, and under V.A.M.S. §367.100 statutes in V.A.M.S. Chapters 362,

364, 367, 369, 370, and 371 become relevant. Moreover, in many statutes there are cross references to other statutes that are not specifically identified.

The complexity of determining what other statutes are relevant and applicable is comparable to the issue involved in the case of *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589, 604, 87 S.Ct. 675, 17 L.Ed.2d 629, 641 (1967), which held invalid for vagueness certain New York statutes whose meaning was complicated by the profusion of statutes and regulations, and the many cross references to interrelated statutes and rules.

As to the difficulty of determining whether the primary use intended by the borrower is for personal, family, or household purposes, the statute gives no guidelines as to how to determine the borrower's primary intended use, and there are no objective standards for determining a borrower's intent, or primary intended use. Although criminal statutes often involve determining the intent of the wrongdoer, V.A.M.S. §408.096 is different, because it makes the criminality of acts of the arranger of credit depend upon the intent of someone else. In effect, an arranger of credit may commit a crime inadvertently by making an erroneous determination of the intent of a borrower. Such an issue certainly deserves the plenary consideration of the Supreme Court of the United States.

The substantive difficulty of determining whether the primary use of a borrower is for "family" purposes is underscored by the decision in *Feely* v. *Birenbaum*, 554 S.W.2d 432, 435 (Mo.App., 1977), which indicates that there is no single definition of the word "family", and that it is a word capable of many different meanings. The substantive difficulty of determining what use is for a "household" purpose is underscored by the decision in *Cobb* v. *State Security Insurance Co.*, 576 S.W.2d 726, 738 (Mo.Sup., 1979), which declared that the word

"household" is a chameleon-like word, whose definition depends on the facts of each case.

3. Thirdly, there is a highly important issue of whether constitutional due process has been denied to Appellants by the limited scope of appellate review of the summary judgment applied by the Missouri Supreme Court in its Opinion and in its refusal of a rehearing. This issue has three facets.

First, it involves the failure or refusal of said court to apply the Federal due process consitutionality test for vagueness of a criminal statute, cited in Appellants' Brief, as declred in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322, 328 (1926) and *Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 48 L.Ed.2d 243, 253 (1976). The test therein declared was whether the terms of the statute are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. Instead of the Federal test, the Missouri Supreme Court applied the Missouri test for a non-criminal statute, as stated in *Prokopf* v. *Whaley*, 592 S.W. 2d 819, 824 (Mo.Sup., 1980). The state test was whether the words used in the statute are of common usage and understandable by persons of ordinary intelligence.

Secondly, the Missouri Supreme Court Opinion ignored two issues that were covered by Appellants' Brief, thereby resulting in a denial to the Appellants of a meaningful hearing at a meaningful time on such issues, even though such issues were pleaded in Appellants' Petition and presented to the trial court. One issue ignored by the Missouri Supreme Court was the vagueness of the term "arranging credit" in the context of the challenged statute. Instead of considering the term "credit" in reference to the statutory context of proceeds "which are intended to be used by the borrower primarily for personal, family or household purposes", as argued by Appellants, under the Motion for

Summary Judgment, the Missouri Supreme Court considered the term "arranging credit" as if standing alone. The Court based its action on the cases of *School District of Kansas City* v. *Smith,* 111 S.W.2d 167 (Mo.Sup., 1937) and *Alexander* v. *Haden,* 2 Mo. 211 (1830), on the misconception that all the areas of vagueness covered by Appellants' Brief were not presented by Appellants to the trial court. Neither of the two cases relied upon by the Missouri Supreme Court involved a summary judgment proceeding, which only went into effect in Missouri in 1960, with the adoption of V.A.M.R. 74.04.

Another issue ignored by the Missouri Supreme Court was the due process and equal protection issue briefed by Appellants pertaining to Article 3, §44 of the Missouri Constitution of 1945, which requires that rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business. Under *Household Finance Corp.* v. *Shaffner,* 203 S.W.2d 734, 738 (Mo.Sup., 1947) and *St. Louis Teachers' Credit Union* v. *Marsh,* 585 S.W.2d 474 (Mo.Sup., 1979), this constitutional provision makes V.A.M.S. §408.096 an invalid form of discrimination, even if the classification has some reasonable basis, because the statute denies any interest on promissory notes which it declares void, while allowing interest on similar promissory notes that are permitted by other statutes. Since Appellants depend upon third party lenders to provide funds for loans on credit arranged by Appellants as agents of borrowers, the Appellants had a substantial consitutional right at stake in V.A.M.S. §480.096. Under the principles recognized in *Logan* v. *Zimmerman Brush Co.,* _____ U.S. _____, 102 S.Ct. 1148, 71 L.Ed.2d 265, 274-277, 279 (1982), the Missouri constitutional provision creates a substantial property right in Appellants, which cannot validly be denied under due process and equal protection clauses of Amendment 14 without an opportunity to Appellants to be heard at a meaningful time and in a meaningful manner.

The Appellants' Petition clearly indicated the integral relationship of the provisions of Article 3, §44 of the Missouri Constitution of 1945 to the due process and equal protection clauses of Amendment 14, §1 of the Constitution of the United States, in the same context as presented on the Motion for Summary Judgment. In essence, the Missouri Supreme Court deviated from its prior decisions in failing to apply the above cited provision of the Missouri Constitution of 1945 to invalidate V.A.M.S. §408.096.

The Missouri Supreme Court's refusal to consider or deal with the foregoing two issues violates the principle of *Snowden* v. *Northwest Missouri State University,* 624 S.W.2d 161, 165 (Mo.App., 1981), that review of a summary judgment is equivalent to reviewing a court tried or equity proceeding, which under V.A.M.R. 73.01(c) requires the appellate court to review the case upon both the law and the evidence as in suits of an equitable nature. Under *Murphy* v. *Carron,* 536 S.W.2d 30, 32 (Mo.Sup., 1976), such appellate review of suits of an equitable nature involves a determination of whether the decree of the trial court is supported by any substantial evidence or is against the weight of the evidence, and whether it erroneously declares the law or erroneously applies the law. In the case at bar, the Missouri Supreme Court has not applied or has erroneously applied the law in the respects indicated above. The Missouri Supreme Court also has failed to apply the rule of *Debow* v. *Higgins,* 425 S.W.2d 135, 140 (Mo.Sup., 1968), which declared that appellate review of a case tried by the court without a jury is limited to the specific matters urged on appeal.

The obvious effect and intent of the summary judgment and decree of the trial court was to rule upon all issues of law encompassed by Appellants' Petition, even though the summary judgment and decree of the trial court was granted in opposition to Appellants' Motion for Summary Judgment. If the action of the Missouri Supreme Court in ignoring the foregoing two

issues briefed by Appellants is permitted to stand, the effect would be to deny to Appellants a meaningful hearing and consideration of the particular issues of law just described. Such action would constitute the same type of action that was held to violate the due process rights of the Appellants in *Fountain* v. *Filson*, 336 U.S. 681, 682-683, 69 S.Ct. 754, 93 L.Ed. 971, 973 (1949), and in *Jaffke* v. *Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314, 315 (1957).

Third, as mentioned under Paragraph 1 above, the Missouri Supreme Court Opinion adopted as fact certain suggestions contained in the Brief of Appellee, John Ashcroft, Attorney General of the State of Missouri, as to what could be the substantial state interest underlying enactment of V.A.M.S. §408.096. Under V.A.M.R. 81.12(b), the Record on Appeal does not include briefs and memoranda. Under principles recognized in *Rawlings* v. *Taylor*, 477 S.W.2d 737, 739 (Mo.App., 1972) and *Davis* v. *Long*, 521 S.W.2d 7, 9 (Mo.App., 1975) statements in briefs of counsel that are unsupported by the record may not be a basis for appellate review, whatever the probability of their truth, unless such statements have been conceded by opposing counsel. Counsel for Appellants have not conceded as fact the suggestion contained in the Brief of Appellee, John Ashcroft, Attorney General of the State of Missouri, and there is nothing in the Record on Appeal that indicates any such concession by counsel for Appellants.

Under the principles recognized in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 74 L.Ed. 1107, 1112 (1929) and *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-367, 53 S.Ct. 145, 77 L.Ed. 360, 367-368 (1932), issues of Federal constitutional law that first appear in the Opinion of the State's highest court are properly subject to review by the Supreme Court of the United States if raised in a motion for rehearing in the state court, as was done in this case.

With respect to the Federal constitutional law issues mentioned above that were ignored by the Missouri Supreme Court, such issues are proper subjects for decision by the Supreme Court of the United States under the principle recognized in *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282, 52 S.Ct. 556, 76 L.Ed. 1102, 1107 (1932), that constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it.

CONCLUSION

For the reasons indicated above, the issues of law presented by this appeal are properly the subject of review by appeal, and probable jurisdiction should be noted. Moreover, such issues are so substantial as to require plenary consideration, with briefs and oral argument.

Respectfully submitted,

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